PP v. HASRUL ABD HAMID & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
AMELATI PARNELL JC
[CRIMINAL APPEAL NOS: BKI-42(ORS)-7-9-2019, BKI-42(ORS)-8-9-2019, BKI-42(ORS)-9-9-2019 & BKI-42(ORS)-10-9-2019]
13 OCTOBER 2021

Abstract – *Section 66A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 provides a platform for exploited victims to be compensated for the work done and services rendered, especially when the victims were hindered financially or had no other means under the existing legal framework to pursue their claims. The immigration status of these victims would be irrelevant and any limitations of such nature introduced under any labour legislation or regulations could be circumvented.*

CRIMINAL LAW: *Offences – Trafficking in persons – Victims promised employment in restaurant but made to work in night club instead – Victims did not receive wages but did not incur expenses either during working period – Lodgings, meals, clothes and expenses fully-paid for – Whether victims entitled to compensation – Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 14 & 66A*

The respondents were charged at the Sessions Court, for four offences of trafficking in four children ('victims'), an offence under s. 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('Act'), read together with s. 34 of the Penal Code. The victims were first introduced to the second respondent while in search for a job. Thinking that they would be employed as waitresses at a restaurant, the victims agreed to meet up with the second respondent. However, instead of working at a restaurant, they were brought to work as 'ladies' drink' at night clubs. According to the victims, they were (i) promised a salary of RM3,000 per month but, while working, they never received any wages. Their lodgings, meals, clothes and expenses were all fully paid for; and (ii) constantly under threats by the second respondent and, even when she was not around, her other friends were always there to guard the victims. At the conclusion of the trial, the Sessions Court Judge ('SCJ') found the respondents guilty, convicted them for the offence and sentenced them to 24 years' imprisonment. The appellant ('prosecution') applied for an order for payment of compensation of RM3,000 be paid by the respondents to each victim, pursuant to s. 66A of the Act, but the application was dismissed. Hence, the present appeal. In

A support of the appeal, the prosecution submitted that the victims were each promised a salary of RM3,000 per month. Since they have been working for three months, each victim was entitled to RM9,000.

Held (dismissing appeal):

B **(1)** The legislative intent of s. 66A of the Act was to provide a platform and means to exploited victims to be compensated for the work done and services rendered, especially when the victims were hindered financially or had no other means under the existing legal framework to pursue their claims. The immigration status of the victims would be irrelevant and any limitations of such nature introduced under any labour legislation C or regulations could be circumvented. Under such provision, any trafficking or smuggled victims were entitled to compensation and payment arrears regardless of their immigration status. Due to the immigration and financial status of the victims, they would not be able to remain in this country. Thus, by providing compensation under such D provision, victims could be compensated immediately without having to undergo the time consuming and high-cost character of a fresh civil suit for damages and return to their respective countries at the end of the criminal trial. (para 27)

E **(2)** No evidence was elicited from the respondents, by the prosecution, on whether there were expenses incurred by the victims during their working period. There was also doubt as to the duration of employment by the victims. The victims stated that they started working in November 2017 at Lahad Datu. When they moved to Tawau sometime in December 2017, the victims themselves testified that they did not F work. Only when they moved back to Lahad Datu in January 2018 that they resumed working at another night club. As such, the victims only worked for two months, contrary to the submission of the prosecution that they worked for three months. Due to the lack of explanation provided on the payment of wages and, in the absence of any reliable G evidence, the court could not act at its own accord. The principle on compensation required that order was only to be issued in clear and straightforward cases. (paras 42, 45, 48 & 53)

Case(s) referred to:

H *Leong Ka Kong v. PP [1975] 1 LNS 86 HC* ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
PP v. AOB [2011] 2 SLR 793 ***(refd)***
PP v. Donohue Enilia [2005] 1 SLR 220 ***(refd)***
R v. Inwood (1974) 60 Cr App R 70 ***(refd)***
Shahrin Ahmad Suffian v. PP [2015] 1 LNS 206 HC ***(refd)***
I *Soh Meiyun v. PP [2014] 3 SLR 299* ***(refd)***

Legislation referred to:
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 2, 14, 66A(2)
Criminal Procedure Code, ss. 426(1A), (1B), (1C), (1D), 432
Penal Code, s. 34

For the appellant - Mohd Khairuddin Idris; DPP
For the respondents - Ram Singh & Kimberly Ye; M/s Ram Singh & Co

Reported by Najib Tamby

JUDGMENT

Amelati Parnell JC:

Introduction

[1] The first and second respondents were charged and tried for four offences of trafficking in children under s. 14 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM) (Act 670) read together with s. 34 of the Penal Code (PC). All four charges were registered in four different case numbers but heard jointly at the Sessions Court.

[2] At the end of the whole trial, the trial court found that the appellant had proved its case beyond reasonable doubt against the first and second respondents on the said charges. The first and second respondents were found guilty, convicted and sentenced accordingly.

[3] There were four victims altogether which will be referred as trafficked person 1 ("TP1"), trafficked person 2 ("TP2"), trafficked person 3 ("TP3") and trafficked person 4 ("TP4") respectively in this appeal.

[4] Given the fact that both respondents were convicted before the trial judge, the appellant had applied s. 66A of the Act 670 seeking an order for payment of compensation to the trafficked persons *ie*, "TP1", "TP2", "TP3" and "TP4" be made by the trial judge.

[5] The application however, was dismissed on 26 August 2019 as stated in grounds of decision at para. 3 p. 2 Vol. 1 of ROA.

[6] Aggrieved by the said impugned order, hence the appeal concerning s. 66A of Act 670 registered under criminal appeal number (7), (8), (9) and (10) respectively.

Petition Of Appeal

[7] In the petition of appeal, appellant put forth the following ground namely:

A (i) The learned Sessions Court Judge had erred in law and in fact when she failed to evaluate the evidence adduced in the course of inquiry *in toto* on a maximum evaluation which warrants the invocation of s. 66A of Act 670 upon the respondents, accordingly.

B **[8]** Therefore, prays that the order made by the learned Sessions Court Judge be varied and substituted with another order as justice deemed fit and relevant.

The Law

[9] Section 66A of the Act 670 provides:

C **66A. Order for payment of compensation to the trafficked person**.

(1) The Court before which a person is convicted of an offence under this Act may make an order for the payment of a sum fixed by the Court by way of compensation by the convicted person to the trafficked person.

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(2) In relation to the order of the payment of compensation, subsections 426(1A), (1B), (1C) and (1D) of the Criminal Procedure Code shall apply.

(3) For the purposes of payment of compensation, s. 432 of the Criminal Procedure Code shall apply.

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(4) The order of payment of compensation under this section shall not prevent the commencement of any civil action in Court by the trafficked person against the convicted person.

[10] The term "court" is defined under s. 2 of the Act 670 as follows:

F **Interpretation**

2. In this Act, unless the context otherwise requires – "Court" means Sessions Court;

[11] The sub-ss. 426(1A), (1B), (1C) and (1D) of the Criminal Procedure G Code (Act 593) provides as follows:

Order for payment of costs of prosecution and compensation.

426. ...

(1A) Without prejudice to subsection (1), the Court before which an accused is convicted of an offence shall, upon the application of the H Public Prosecutor, make an order against the convicted accused for the payment by him, or where the convicted accused is a child, by his parent or guardian, of a sum to be fixed by the Court as compensation to a person who is the victim of the offence committed by the convicted accused in respect of the injury to his I person or character, or loss of his income or property, as a result of the offence committed.

(IB) Where the person who is the victim of the offence is deceased, the order of compensation shall be made to a representative of the deceased person.

(IC) The Court shall, in making an order under subsection (1A), take into consideration the following factors:

(a) the nature of the offence;

(b) the injury sustained by the victim;

(c) the expenses incurred by the victim;

(d) the damage to, or loss of, property suffered by the victim;

(e) the loss of income incurred by the victim;

(f) the ability of the convicted accused to pay; and

(g) any other factors which the Court deems relevant.

(1D) For the purpose of making an order under subsection (1A), the Court may hold an inquiry as it thinks fit.

[12] Section 432 of the Act 593 provides as follows:

Provisions as to money payable as costs or compensation

432. (1) Subject to the provisions of this Code where any person is, under this Code, for any reason whatsoever, ordered to pay any sum of money by way of costs or compensation, the Court making the order may in its discretion do all or any of the following things, namely:

(a) allow time for the payment of that sum;

(b) direct payment of that sum to be made by instalments;

(c) issue a warrant for the levy of that sum by distress and sale of any property belonging to that person;

(d) direct that in default of payment or of a sufficient distress to satisfy such sum, that person shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under a commutation of sentence:

Provided that where time is not allowed for the payment of that sum an order for imprisonment in default of payment shall not be issued in the first instance unless it appears to the Court that that person has no property or insufficient property to satisfy the money payable or that the levy of distress will be more injurious to him or his family than imprisonment;

(e) direct that that person be searched and that any money found on him when so searched or which in the event of his being committed to prison, may be found on him when taken to prison shall be applied towards the payment of that sum, the surplus, if any, being returned to him:

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> Provided that such money shall not be so applied if the Court is satisfied that the money does not belong to the person on whom it was found or that the loss of the money will be more injurious to his family than his imprisonment.

(2) The term for which the Court directs that person to be imprisoned in
B default of payment or of a sufficient distress to satisfy any sum shall not exceed the following scale:

> When the money to be paid does not exceed RM500 ... One month
>
> When the money to be paid exceeds RM500 but does not ... Two
C months exceed RM1000
>
> In any other case ... Six months

(3) Subject to the provisions of this Code the imprisonment which the Court imposes under this section shall terminate whenever the money is paid or levied by process of law.

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(4) If before the expiration of the time of such imprisonment such a proportion of the money is paid or levied that the time of imprisonment suffered is not less than proportional to the part of the money still unpaid, the imprisonment shall terminate.

(5) A warrant for the levy of any such sum may be executed at any place
E in Malaysia but if it is required to be executed outside the State in which it is issued it shall be endorsed for that purpose by a Judge or a First Class Magistrate having jurisdiction in the State in which it is to be executed.

An Evaluation Of The Facts Of The Offence

F **[13]** Section 14 of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) read:

Section 14. Offence of trafficking in children provides that:

> Any person, **who traffics in persons being a child, for the purpose of exploitation**, commits an offence and shall, on conviction, be
G punished with imprisonment for a term not less than five years and shall also be liable to whipping.
>
> (emphasis added)

[14] Section 2 of Act 670, it defines "exploitation" as:

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> all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.

[15] In the present case the act of exploitation by first and second respondents involved:

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(i) the second respondent who recruited TP1, TP2, TP3 and TP4 as "ladies' drinks" and then harboured and provided for them by arranging for their transportation and lodgings from Kota Kinabalu to Lahad Datu, Tawau then back to Lahad Datu and Kota Kinabalu; and

(ii) the first accused who conveyed and transferred TP1, TP2, TP3 and TP4 from Lahad Datu to Kota Kinabalu and subsequently to Hideout Karaoke.

[16] The recruiting, harbouring, conveying, transferring and providing for TP1, TP2, TP3 and TP4 were done through coercion in the form of threat of serious harm or a scheme that caused the trafficked persons to believe that if they did not do the work, serious harm would happen to their families. The trafficked persons were constantly under threats by the second accused and even when she was not around, her other friends were always there to guard them.

[17] At the end of the whole trial, the learned SCJ found that the prosecution had proved its case beyond reasonable doubt against the first and second respondents on the said charges. The first and second respondents were found guilty, convicted and sentenced.

[18] The first and second respondents' appeal against sentence was dismissed on the 3 September 2019 (see BKI-42S-2-2-2019). Hence, sentence imposed by the learned SCJ was affirmed accordingly of which the first and second respondents to serve a total of 24 years' imprisonments sentence for the four charges.

[19] As to the application for compensation under s. 66A of the Act 670, the learned DDP had summarised the testimonies of TP1, TP2, TP3 and TP4 in his submission which is quoted below:

> [9] Having said that, this appeal is leaned towards the evidence adduced before the trial judge, as follows:
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> [9.1] That the appellant contended – the second respondent persuaded them (TP1 till TP4) that they could earn RM3,000 per month ...". The relevant evidence by TP1, TP2, TP3 and TP4 is reproduced as follows:
>
> [9.2] As evident by TP1, she testified as follows: Line 541 & 542 Page 20/292 Vol. 2 of ROA [NOP])
>
> Q: Apa lagi Rachel bagi tahu kamu pasal kerja ladies drink?
>
> A: Kerja ladies drinklah, dia cakap lama-lama tinggilah gaji dalam 3 ribu macam tu.
>
> (Additional evidence in detail by TP1, as per lines 516 – 566 of the Notes of Proceedings "NOP" Page 19 – 21/292 Vol. 2 of ROA [NOP])
>
> [9.3] As evident by TP2: Line 2409 - 2418 Page 84/292 Vol. 2 of ROA [NOP]
>
> Q: Boleh ceritakan macam mana kamu mula kenal dengan Mummy tu?
>
> A: "... Lepas tu dia cakap dia promosi gaji dia bilang gaji 1 bulan dapat paling-paling RM3,000 satu bulan, ..."

A (Additional evidence in detail by TP2, as per lines 2409 - 2499 of the NOP Page 84 - 87/292 Vol. 2 of ROA [NOP])

[9.4] As evident by TP3: Line 4081 - 4085 Page 139 - 140/292 Vol. 2 of ROA [NOP]

B Q: Lepas tu kamu buat apa?

A: "... jadi kami terpengaruh dan perkataan gaji RM3,000, emas segala rantai, jadi kami terpaksa ikut dia kerja begitu ..."

(Additional evidence in detail by TP3, as per lines 4038 - 4085 of the NOP Page 138 - 140/292 Vol. 2 of ROA [NOP])

C [9.5] As evident by TP4: Line 5726 - 5729 Page 195/292 Vol. 2 of ROA [NOP]

Q: Masa Rachel cerita pasal kerja pub dengan gaji itu semua, apa yang kamu rasa?

D A: "... kakak saya suruh saya ikut dan dia kata gaji tu, lain ladies drink, lain lagi dari gaji RM3,000"

(Additional evidence in detail by TP4, as per lines 5688 - 5729 of the NOP Page 194 - 195/292 Vol. 2 of ROA [NOP])

E [9.6] The appellant further contended that for the ladies' drink, the customer would pay RM20 and if a trafficked person was booked, she or he would entertain the customer in a private room for RM50 or RM60 per hour. However, they could not keep any payment from the customers as they must hand them over to the second respondent or the customers pay the second respondent themselves.

F This can be seen in lines 739 - 816, 2647 - 2688, 4202 - 4238 and 5872 - 5926 Vol. 2 of ROA [NOP].

[9.7] The appellant further contended that for the work the trafficked persons did at Titanium Karaoke, they were not given any salaries, which was contrary to the RM3,000 monthly salary that was promised by the second respondent. For TP1 and TP3, they were paid RM90 G once but it was taken back by the second respondent as payment for a hotel.

This is transpired in lines 880 - 891, 2684 - 2699, 4286 - 4299 and 5919 - 5933 Vol. 2 of ROA [NOP].

[9.8] The appellant contended further that the boss in Melody Lane H had given them (TP1 till TP4) RM500 however they only spent RM150 for make-up and food as the balance had to be given to Abang Nas.

This evident as in lines 1198 - 1223, 2929 - 2673, 4573 - 4639 and 6169 - 6217 Vol. 2 of ROA [NOP].

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[9.9] The appellant further raised that at Melody Lane Lahad Datu, they (TP1 till TP4) had to work daily from 8.00 p.m. or 9.00 p.m. until 1.00 a.m. or 1.30 a.m. with RM20 for ladies' drinks and RM50 or RM60 for booking. They could not keep the payment as it was kept by the boss named Ah Ken and had yet to receive salaries.

This can be seen in lines 1223 - 1250, 2978 - 2997, 4641 - 4670 and 6256-6279 Vol. 2 of ROA [NOP].

[10.0] The appellant contended further that even though this time they had keys to the quarters, they were afraid to quit, escape or get help as Abang Nas demanded money and had threatened to find and hurt them should they escape.

This is transpired in lines 1252 - 1340, 2999 - 3070, 4676 - 4717 and 6281 - 6327 Vol. 2 of ROA [NOP]

[20] Following the above evidence, the learned DPP submit that both respondents had taken advantage of TP1, TP2, TP3 and TP4's young age, least fortunate, poor situation and undocumented status by recruiting and transferring them with constant threats and no salaries given as promised. Therefore, the non-payment of salaries is another form of exploitation that falls within the ambit of "forced labour or services" as defined under s. 2 of the Act 670, which is in line with the conviction earned upon assessment of the evidence in totality by the trial judge.

[21] Applying the above principles under s. 426(1C) of Act 593, learned DPP further submit that this court as an appellate court shall, in making an order under sub-s. (1A) sought by the appellant, take into consideration the following factors:

(i) the nature of the offence under s. 14 of the Act 670 where it involves four child trafficked persons;

(ii) the emotional and psychological injury sustained by all trafficked persons;

(iii) the expenses incurred by all trafficked persons in a hope that they would be getting a suitable job for a living but ended up being exploited by the accused persons in the end;

(iv) the damage to, or loss of, property suffered by all trafficked persons (if any);

(v) the loss of income of loss of future earnings incurred by all trafficked persons during these painful moments;

(vi) the ability of the convicted respondents to pay in adverse; and

(vii) any other factors which the court deems relevant based on evidence adduced.

[22] The appellant therefore prays for an order for payment of compensation amounting to RM3,000 being paid for each and every trafficked person by both respondents, be granted by this court.

Finding Of This Court

[23] It is necessary to understand the rationale of s. 66A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM) (Act 670).

[24] Rationale of such provision can be elucidated from "Huraian" of the Akta Antipemerdagangan Orang dan Antipenyeludupan Migran (Pindaan) 2015 Bill (D.R. 18/2015) which states the purpose of the introduction of such provision into the existing Act as follows:

> Fasal 16 bertujuan untuk memasukkan seksyen baru 66A dan 66B ke dalam Akta 670 untuk membolehkan Mahkamah **mengeluarkan perintah pembayaran pampasan oleh orang yang disabitkan kepada orang yang diperdagangkan, dan perintah pembayaran gaji tertunggak dalam hal apabila tiada sabitan kepada orang yang diperdagangkan**.
>
> (emphasis added)

[25] Such purpose was further expounded by the then Deputy Minister of Home Affairs (Dato Sri Dr Hj Wan Junaidi Tuanku Jaafar) during the second reading of the bill in the august house on 19 Mei 2015. As lifted from the Penyata Rasmi Parlimen Dewan Rakyat Parlimen Ketiga Belas Penggal Ketiga Mesyuarat Kedua dated 19 Mei 2015, the said Deputy Minister stated:

> Pindaan juga melibatkan peruntukan baru *bagi membolehkan pembayaran pampasan dan/atau pembayaran gaji tertunggak kepada mangsa pemerdagangan orang*. UNTOC dan Protokol TIP dengan secara jelasnya merujuk kepada pembayaran pampasan kepada mangsa dan kemungkinan untuk menggunakan keuntungan yang disita daripada penjenayah bagi tujuan pembayaran pampasan tersebut. Sitaan keuntungan daripada jenayah ini akan bertindak sebagai satu bentuk hukuman serta bagi tujuan untuk mencegah penularan jenayah ini pada masa yang akan datang.
>
> *Bagi aspek pembayaran gaji tertunggak kepada mangsa pemerdagangan orang itu, isu ini adalah kritikal kerana kebanyakan daripada mangsa-mangsa yang berstatus PATI yang tidak membuat tuntutan ini disebabkan kekangan undang-undang yang sedia ada*. Tambahan pula, Akta Kerja 1955 hanya membenarkan tuntutan tunggakan gaji kepada mangsa yang warga asing yang masuk dan bekerja di negara ini secara sah sahaja. Perkara penting yang perlu dijelaskan di sini adalah sekiranya seorang individu dikategorikan sebagai mangsa pemerdagangan orang oleh Mahkamah Majistret, status imigran sama ada sah ataupun PATI adalah tidak relevan.
>
> (emphasis added)

[26] These excerpts made it clear that the legislative intent of this provision when introduced has always been to provide platform and means to exploited victims to be compensated for the work done and service rendered, especially when the victims are hindered financially or have no other means under the existing legal framework to pursue their claims.

[27] With the advent of such provision, the immigration status of the victim will be irrelevant and any limitations of such nature introduced under any labour legislation or regulations can be circumvented. Under such provision, any trafficked or smuggled victims are entitled to compensation and payment arrears regardless of their immigration status. Due to the immigration and financial status of the victims, they would not be able to remain in this country. Thus, by providing compensation under such provision, victims could be compensated immediately without having to undergo the time consuming and high costs character of a fresh civil suit for damages and returned to their respective countries at the end of the criminal trial.

[28] In Singapore, the legislation equivalent to our ATIPSOM (Act 670) is the Prevention of Human Trafficking Act 2014. However, unlike Malaysia, this Singapore legislation does not have any provision on compensation. Instead, for order for payment of compensation, the court resorts to the provision on compensation provided under the Singapore's CPC that reads:

> 359. Order for payment for compensation (1) The court before which a person is convicted of any offence shall, after the conviction, consider whether or not to make an order for the payment by that person of a sum to be fixed by the court by way of compensation to the person injured, or his representative, in respect of his person, character or property by:
>
> (a) the offence or offences for which the sentence is passed; and
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> (b) any offence that has been taken into consideration for the purposes of sentencing only.

[29] Aside from some minor modification, this provision is comparable to our s. 426(1A) of the CPC in that both provisions provide for victim compensation to be made after the accused is convicted and such compensation be made in respect of injury to his person, character or property. Thus, it would be relevant to refer to the principles relating to the award of compensation enunciated in the Singapore's cases.

[30] In Singapore, the award of compensation to victims is described as "a shortcut" remedy to the victim. As depicted in *Soh Meiyun v. PP* [2014] 3 SLR 299, Chao Hick Tin JA held:

> Compensation orders are in effect *a shortcut to the remedy that the victim could obtain in a civil suit against the offender. They are particularly suitable for victims for whom commencing a civil suit would be impractical, and the paradigm example of such victims are impecunious ones …*
>
> (emphasis added)

[31] The compensation order is also appropriate for victims who due to their poor financial background, would not be able to commence a civil suit to seek reparation from the offender. In *PP v. Donohue Enilia* [2005] 1 SLR 220, Yong Pung How CJ held:

> A compensation order **allows compensation to be recovered where a civil suit is an inadequate remedy due to the impecuniosity of the person injured.**
>
> (emphasis added)

[32] To expound further, the then Chief Justice of Singapore refers to the proposition in *R v. Inwood* (1974) 60 Cr App R 70 at 73 that states:

> Compensation orders were not introduced into our law to enable the convicted to buy themselves out of the penalties for crime. **Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable the compensation to be paid**.
>
> (emphasis added)

[33] The court also laid down the following principles relating to the award of compensation in the same case:

> [20] There are several principles relevant for the purposes of deciding whether a compensation order should be granted.
>
> [21] Firstly, **a compensation order does not form part of the sentence** (*PP v. Lee Meow Sim Jenny*; *Lim Poh Eng v. PP*), **nor is it an alternative to a sentence** (*R v. Miller* [1976] Crim LR 694). Therefore, it should not be used as further punishment of a convicted person, **and the amount of compensation ordered should not exceed the amount of damage caused**: *Emperor v. Maung Thin* (1909) 10 Cr LJ 78.
>
> [22] Secondly, **there must be a causal connection between the offence of which the accused is convicted and the personal injury, loss or damage in respect of which the compensation order is mad**e: *R v. Deary* (1993) 14 Cr App R (S) 648 (folld). In other words, the court may make a compensation order only in respect of the injury or loss which results from the offence for which the accused is convicted. The court should adopt a broad common-sense approach in assessing whether compensation should be awarded. **It should not allow itself to be enmeshed in refined questions of causation which may arise in claims for damages under contract law or tort law**; per McCullough J in *Bond v. Chief Constable of Kent* [1983] 1 All ER 456 ...
>
> [23] Thirdly, **compensation will be ordered only in clear cases where the damage is either proved or agreed**: *R v. Vivian* [1979] 1 All ER 48. **The assessment of loss or damage must be based on evidence and not simply on representations by the Prosecution**: *R v. Horsham Justices, ex parte Richards* [1985] 2 All ER 1114.

> [24] Fourthly, it was established in *R v. Daly* (1973) 58 Cr App R 333 that **the power to make compensation orders should only be used for dealing with claims in straightforward cases**. Compensation orders are designed for cases where the amount of compensation can be readily and easily ascertained, and are not for cases where the amount of damages or loss is notoriously disputed: *R v. Donovan* (1981) 3 Cr App R (S) 192. Although the court can hear evidence in order to determine questions as to the fact or quantum of loss, the court should not embark on any complicated investigation: *R v. Briscoe* (1994) 15 Cr App R (S) 699. Indeed, an order should only be made where the legal position is quite clear: *R v. Miller*. The court should decline to make a compensation order unless it is based on very simply stated propositions which have been agreed on or which are simple to resolve: *Hyde v. Emery* (1984) 6 Cr App R (S) 206.
>
> ...
>
> [26] Fifthly, *the order must not be oppressive, but must be realistic in that the court must be satisfied that the accused either has the means available, or will have the means, to pay the compensation within a reasonable time* (*R v. Parker* (1981) 3 Cr App R (S) 278) (folld).
>
> (emphasis added)

[34] In view that the purpose of compensation is to provide redress to the victims of crime for their injuries or losses suffered instead of castigating the accused, the court also held that the question of whether the victim's right to the compensation had been tainted by any fault of his own is of no relevance. Per Yong Pung How CJ, "the court did not have to engage in a balancing exercise to decide if the victim was deserving of compensation."

[35] In *PP v. AOB* [2011] 2 SLR 793, on the purpose of compensation orders under the CPC, Chan Sek Keong CJ held:

> The power to make compensation orders under s. 401(1)(b) of the CPC is a benign and useful power which trial judges should consider exercising in appropriate cases. Such cases would include those where the offender has caused the victim physical injury in respect of which the victim would be entitled to claim damages in a civil action. **Compensation orders are particularly suitable and appropriate for victims who may have no financial means or have other difficulties in commencing civil proceedings for damages against the offender**. Although a custodial sentence or a heavy fine may be appropriate as punishment for the offender, such punishments are cold comfort to a victim who has experienced pain and suffering as a result of the offender's actions and who, as a result, has to bear the burden of medical bills, lost wages and other expenses. In theory, the victim can always bring a civil claim against the offender to recover damages for any loss suffered. However, as just mentioned, this may not be practical for disadvantaged or poor victims.
>
> (emphasis added)

[36] With these principles in the forefront of our mind, the next question is whether the court should allow the award for compensation in this present appeal. However, before granting the application, as per s. 66A(2) of the ATIPSOM (Act 670), the court must take into account the factors provided under s. 426(1C) of the CPC.

[37] In *Shahrin Ahmad Suffian lwn. PP* [2015] 1 LNS 206 Zulkifli Bakar J held that to invoke s. 426(1A) of the CPC, the factors provided under s. 426(1C) of the CPC must be considered. These factors could be retrieved by holding an inquiry as provided under s. 426(1D) of the CPC. Without such inquiry and without any reasons provided by the trial judge indicating that the factors under s. 426(1C) of the CPC have been taken into account, this court must deem the compensation order is unwarranted.

[38] In examining the findings of the learned SCJ, the court must be mindful of its limited appellate jurisdiction, to interfere and intervene only when there is apparent error in law or improper exercise of judicial discretion to correct a miscarriage of justice. See *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163.

[39] As the issuance of compensation order involves the exercise of judicial discretion by the trial judge, the court in its appellate role ought not to interfere with the exercise of discretion until and unless it was found to have been rendered improperly without due regards to the relevant facts and circumstances of the case or the provision of law or on false grounds. See *Leong Ka Kong v. PP* [1975] 1 LNS 86.

[40] In this instant appeal, the application for award of compensation under s. 66A of the ATIPSOM (Act 670) was dismissed by the learned SCJ on the following grounds:

> Findings
>
> [7] TP1 - TP4 testified that they were informed by the second accused/respondent that they could earn a monthly payment of RM3,000.00 for work at a restaurant and that lodgings and meals were provided by the second accused/respondent. PW7 testified that the salary were to be paid at the end of each month. PW7 also testified that they worked from November 2017 until they were rescued on 7 February 2018 at Hideout Cyber Square, Jalan Kepayan, Kota Kinabalu [see line 403-409, page 15 of the NOP Inquiry]. Prior to the rescue, TP1 - TP4 were also brought to Lahad Datu and Tawau. It was not disputed that TP1 - TP4 were not working when they were in Tawau. It was not determined the duration of their works prior to their rescues at Kota Kinabalu and at Lahad Datu.
>
> [8] TP1 - TP4 testified that they were given RM500 by the boss in Melody Lane at Lahad Datu.
>
> [9] PW7 agreed that the first accused/respondent was not involved with this salary arrangement.

[10] It was not determined whether there were any other expenses incurred by TP1 - TP4 during the said period.

[11] Furthermore, if any compensation were to be paid to the trafficked persons, from the evidence, the first and second accused/respondents did not have the ability to pay such amount.

[12] The court also considered other issues raised by the Prosecution/ Applicant and the first and second accused/respondents.

[13] There was no other evidence forthcoming from the Prosecution/ Applicant to assist the court in coming to a finding.

[14] Accordingly, the said oral application by the prosecution/applicant was dismissed.

[41] Based on the testimonies of the victims during the inquiry, they were first introduced to the second accused/respondent while in search for a job. Thinking that they will be employed as waitresses at a restaurant called Restaurant Sinar Mustika, they agreed to meet up with the second accused/ respondent. However, instead of working at the said restaurant, they were brought to Lahad Datu to work as waiter and waitresses ("ladies' drink") at night clubs. Upon their return to work at the night club called Hideout at Cyber City, Kota Kinabalu, they were arrested. While working, they never received any wages. However, based on the evidence adduced, there was no expenses incurred by the victims throughout the working period as their lodgings, meals, clothes, and expenses are all fully paid for.

[42] These was also submitted by learned counsel in this appeal, in that no evidence was elicited from the respondents by the appellant throughout the trial on whether there were any expenses incurred by TP1 to TP4 during the said period. [See cross-examination of the first accused/respondent and second accused/respondent by the learned DPP at ROA; vol. 2 at pp. 384 - 411.]

[43] Further the receipts tendered [ex. P5(1-3)] merely shows that the TP1 and TP3 were working at the night club Hideout when the police ambushed. Such receipts could not be used to ascertain the amount of wages and therefore the compensation to be paid to the victims.

[44] The prosecution/appellant submitted that the victims were promised salary totalling RM3,000 per month. It was due to this promised salary that the victims agreed to work with the second accused/respondent. Since they have been working for three months, each victim is therefore entitled to RM9,000. However, no evidence adduced to support such contention.

[45] There is doubt as to the duration of employment by the victims. The victims stated that they started working in November 2017 at Lahad Datu. When they moved to Tawau sometime in December 2017, the victims themselves testified that they did not work. Only when they moved back to

A Lahad Datu in January 2018 that they resumed working at another night club called Melody Lane. As such, the victims only worked for two months, contrary to the submission of the prosecution/appellant.

[46] Nonetheless, despite not working while at Tawau, the victims were still under the strict care and control of the second accused/respondent. B Thus, do they still entitle to the promised monthly payment during their stay in Tawau?

[47] Since the charges against the respondents concern what happened in Hideout Cyber Square, Jalan Kepayan, Kota Kinabalu, the learned SCJ was correct not to consider any issues on salary payments in Tawau or Lahad C Datu. In any event, TP1 to 4 were given RM500 in Melody Lane at Lahad Datu. Therefore, the LSCJ did not make errors in her findings at paras. [8] to [10].

(See NOP at ROA; vol. 2 at pp. 43 - 44; lines 1222 - 1253) examination-D in-Chief of TP-1 by DPP:

Q: Kerja di Melody Lane ni macam mana pula?

A: Sama juga kerjanya, layan customer dari meja ke meja.

Q: Dari jam berapa hingga berapa kamu kerja sebagai ladies di Melody Lane? E

A: Jam 8PM - 1AM saja.

Q: Di Melody Lane macam mana dengan bayarannya?

A: Di sana RM20 juga, 1 jam dia RM50.

F Q: Di Melody Lane dalam 1 malam berapa bayaran yang kamu dapat?

A: RM80 macam tu.

Q: Berapa lama kamu kerja di Melody Lane?

A: Dalam 4 minggukah.

G (See NOP at ROA; vol. 2 at p. 157; lines 4598 - 4608) Examination-in-Chief of TP-3 by DPP:

Q: Tadi kamu cakap berjumpa dengan Abang Nas di LD, apa jadi lepas tu?

H A: Abang Nas bawa kami berjumpa dengan bos, bos yang Rachel cakap yang janjikan kami dengan duit sebanyak RM1,000 dan tempat tinggal hostel dan kami berjumpa dengan bos tu dan berbincang pasal kerja, pasal duit dan pasal hostel yang dijanjikan kepada kami, bos itu memberikan kami cuma RM500 saja.

Q: Siapa bos ni? I

A: Bos kepada karaoke.

Q: Karaoke di mana?

A: LD juga, Melody Lane.

(see NOP at ROA; vol. 2 at p. 210 - 211; lines 6190 - 6198)

Q: Kerja pub ini di mana?

A: Dekat LD.

Q: Apa nama tempat tu, kerja pub ini?

A: Melody Lane.

Q: Lepas kamu kena interview tu, kamu ke mana pula?

A: Lepas tu Nas dia minta duit dengan tu bos RM500 dan Nas suruh tu duit beli mekap untuk kerja. Dan RM500 kami cuma pakai RM150. RM350 tu dia ambil.

[48] Due to the lack of explanation provided on the payment of wages and in the absence of any reliable evidence, this court cannot act at its own accord. It is the principle on compensation that requires that order is only to be issued in clear and straightforward cases. No evidence was elicited from the respondents by the appellant throughout the trial on whether there were any expenses incurred by TP1 to TP4 during the said period.

[49] I am therefore with learned counsel that, in all intents and purposes, the learned SCJ made correct findings when she held (at para. [13] of her findings in the grounds of decision) that:

> There was no other evidence forthcoming from the Prosecution/Applicant to assist the court in coming to a finding.

[50] Since in this present appeal the amount of compensation cannot be easily and readily ascertained, this court must decline to grant such order. This court must also decline in the event this court is needed to embark on a complicated investigation to ascertain the compensation amount as in this instant appeal. There is also no evidence led to show that these victims have suffered any injury as a result of the offence committed by the respondents.

[51] On a separate note, learned counsel had submitted that the pre-condition to award compensation or payment in that it must be before "a person is convicted of an offence" as stipulated in s. 66A(1) of the Act 670 and s. 426(1) and (1A) of the CPC.

[52] With respect, I must say such contention is misleading construction of the said provision. Section 66A(1) clearly state "the court before which a person is convicted of an offence under this Act may make an order for the payment of a sum fixed by the court by way of compensation by the convicted person to the trafficked person.". The phrase used is "before which a person is convicted" instead of "before a person is convicted" as quoted by learned counsel. Therefore, by literal interpretation of such provision, it

only empowers the court who convicted a person of any offence under the ATIPSOM (Act 670) to order such convicted person to pay compensation to the trafficked person. There is nowhere in such provision that requires the compensation order or request as such to be issued before the accused is convicted. Such interpretation is further strengthened when referred to the Bahasa Malaysia's version of the said provision which states:

> Mahkamah **yang di hadapannya** tertuduh disabitkan atas suatu kesalahan di bawah Akta ini boleh membuat suatu perintah bagi pembayaran oleh orang yang telah disabitkan bagi suatu jumlah yang akan ditetapkan oleh Mahkamah sebagai pampasan kepada orang yang diperdagangkan.
>
> (emphasis added)

Conclusion

[53] Having considered the record of appeal and submission by the parties, there is lack of explanation provided on the payment of wages and in the absence of any reliable evidence, this court cannot act at its own accord. It is the principle on compensation that requires that order is only to be issued in clear and straightforward cases.

[54] Since in this present appeal the amount of compensation cannot be easily and readily ascertained, this court must decline to grant such order. This court must also decline in the event this court is needed to embark on a complicated investigation to ascertain the compensation amount as in this instant appeal. There is also no evidence led to show that these victims have suffered any injury as a result of the offence committed by the respondents.

[55] The learned SCJ correctly took into account in her findings on the ability of the first and second respondents' means to pay should compensation be awarded, including other issues raised by the prosecution/ applicant (appellant) and the respondents in evidence during the inquiry.

[56] For the above reasons, this court found no error in the findings of the learned SCJ and the dismissal of the compensation application under s.66A of the ATIPSOM (Act 670) is affirmed. This appeal is therefore dismissed.